REDEFINING IMMINENCE: THE USE OF FORCE AGAINST THREATS AND ARMED ATTACKS IN THE TWENTY-FIRST CENTURY

Dominika Švarc[*]

Abstract

Contemporary global security threats pose a serious challenge to the existing international legal regime on the use of force. Preventing the potentially devastating consequences of an unconventional armed attack launched by terrorist groups or hostile governments might require an earlier

* Dominika Švarc, LLM Public International Law; Ph.D. Candidate in Political Science at the University of Ljubljana; 2006/07 Visiting Research Student and Research Assistant in International Law, London School of Economics and Political Science.

action. Yet, international law seriously restricts the ability of States to respond to such risks using military force in the absence of an actual or imminent armed attack, or Security Council authorization. The U.S. National Security Strategy of 2002 seeks to modify the current regime by expanding the narrow standard of imminence that traditionally defines the scope of justifiable unilateral action against threatened attacks. More ambitiously, it pushes aside the normative restraints to the launch of preventive military strikes by declaring the willingness of the U.S. administration to act alone against more remote threats before they have fully materialized. This paper addresses the tension between the existing legal rules governing the unilateral use of force and the assertions that these rules should be expansively interpreted, or even modified, to properly reflect the compelling needs of the new security environment. It seeks to evaluate, in abstract terms, the ramifications of such proposals and lays out the dimensions of the possible normative change.

I. INTRODUCTION

> To put it simply, and, I fear, through a banality it may not deserve, the message is that there must be limits to the exercise of power . . . and that when professional men and women engage in an argument about what is lawful and what is not, they are engaged in a politics that imagines the possibility of a community . . . allowing a meaningful distinction between lawful constraint and the application of naked power.[1]

Drafted at the conclusion of the most destructive war in history, the United Nations (UN) Charter sought to prevent aggressive war by eliminating virtually all uses of force between States, save in cases of individual or collective self-defence against an armed attack or under authorization of the Security Council. Six decades later, however, inter-state wars are no longer the main threat to the stability of the international system. Rather, the threat of asymmetric warfare, launched by international terrorist organizations and hostile governments holding weapons of mass destruction,[2] forced the international community to reconsider the Cold-War State-centred paradigm of armed conflict, which had framed the structure of international law on the use of force for the past half a century.

---

1. MARTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 503 (2002).

2. The phrase "hostile governments" refers in this paper to governments with weapons of mass destruction that manifest certain hostile intent and/or support the activities of terrorist groups residing within their territories.

This mismatch between the contemporary threat environment and international legal rules on the use of force generated a degree of scepticism among statesmen and scholars as to whether the existing international rules are still applicable to the rapidly changing security context. Claims have been made that the existing legal framework no longer enables states to efficiently respond to the changing security needs. In its 2002 National Security Strategy (NSS), the U.S. administration called for a more permissive approach to the use of force in self-defence.[3] They did so in two decisively different ways. The NSS first proposes a more expansive reading of the traditional standard of imminence, which arguably defines the scope of a legally valid unilateral action against an enemy that is *just about* to attack.[4] More ambitiously, the NSS drops this narrow standard of imminence altogether by declaring the willingness of the US administration to act alone against purely hypothetical threats even before they have fully emerged.[5]

At the outset, the semantics at play must be clarified. The terms "anticipatory," "pre-emptive" or "preventive" self-defence are often used interchangeably, but should not be regarded as synonyms since many practical consequences result from their use or misuse. For the purpose of this paper, the term "anticipatory" denotes military actions against imminent threats of an armed attack, while the term "preventive" designates the use of military force against developments or behaviour that may mature into threats of an armed attack at some unspecified time in the future. In the context of this essay, the term "pre-emptive" refers to the doctrine of anticipatory, not preventive, self-defence, unless used differently in the context of quoted statements.

The following analysis is both descriptive, drawing upon the current international regulation of the use of force (*de lege lata*), and prescriptive, reading the validity of anticipatory and preventive military actions from the perspective of the future of international law (*de lege ferenda*). The first part of the paper examines whether the existing rules permit unilateral military action against threatened attacks and suggests that States may use force in anticipation of an imminent armed attack under certain stringent conditions. The second part proceeds to examine the claims that international legal rules on the use of force need to be relaxed or even changed to accommodate new realities. While granting that defensive military actions may be justified, in extreme cases, even when the threat is overwhelming but not temporally imminent, the present writer concludes that accepting the logic of unilateral

3. *See generally* White House, The National Security Strategy of the United States of America (Sept. 17, 2002) [hereinafter National Security Strategy].

4. *Id.* at 15.

5. *Id.*

preventive military action against the threats-to-be remains abhorrent to the global order governed by the rule of law.

Two methodological notes must be made at the beginning to delimit the subject and evade confusion. First, although the U.S. National Security Strategy has stimulated the present discussion, it is referred to primarily for illustrative reasons. It exemplifies an actual policy debate, by bringing specific contemporary threats into focus and proposing specific means of dealing with them, including unilateral military action in extreme cases. However, the aim of this paper is not to evaluate the legality of any particular governmental policy or action. Rather, it addresses the questions of anticipatory and preventive actions in general and abstract terms. Second, although the relevance of both strategic considerations and moral dilemmas of this thorny issue cannot be denied, these aspects are beyond the scope of this paper, which centres upon the legal arguments on legitimate responses to contemporary security needs.

II. CURRENT SCENARIOS: NORMATIVE RESTRAINTS ON THE USE OF FORCE

A. Point of Departure: Prohibition of the Use of Force

The starting point is uncontroversial: The Charter of the United Nations emphasizes that peace is the fundamental aim of the newly established international organization, and is to be preserved if at all possible.[6] The preamble expresses a determination of the United Nations "to save succeeding generations from the scourge of war," "to practice tolerance and live together in peace with one another as good neighbours," "to unite our strength to maintain international peace and security," and to ensure "that armed force shall not be used, save in the common interest."[7] Article 1(1) sets forth as the primary purpose of the United Nations:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[8]

The Charter then goes on to set out two fundamental principles of the United Nations. First, Article 2(3) asks States to settle their international

6. *See generally* U.N. Charter at Preamble.
7. *Id.* at Preamble.
8. *Id.* at art. 1, para. 1.

disputes by peaceful means.[9] Second, Article 2(4) articulates the general prohibition of the use of force:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.[10]

Unquestionably, the prohibition of the use or threat of force contained in Article 2(4) forms not only a part of the conventional[11] but also of general customary international law. The International Court of Justice has described this provision as a rule of *jus cogens,* binding upon all States, not only members of the United Nations.[12] The *travaux préparatoires* of the UN Charter reveal that Article 2(4) was intended to operate as an "absolute all-inclusive prohibition; the phrase 'or in any other manner' was designed to ensure that there should be no loopholes."[13] This view is supported by the majority of scholarship, including commentators like Charney,[14] Dinstein,[15] Gray,[16] and Randelzhofer.[17] States are prohibited from using force in international relations and from threatening others with the use of force in all but narrowly defined circumstances. In other words, the effect of Article 2(4) is that any specific use of force is lawful only if it is based on a legal exception to this prohibition.

The Charter explicitly envisaged only two exceptional situations: 1) collective military enforcement action taken or authorized by the UN Security Council in accordance with Chapter VII (and by extension for regional organizations under Chapter VIII); and 2) the exercise of individual or collective self-defence as outlined in Article 51 of the Charter.[18] The legality

---

9. *Id.* at art. 2, para 3.

10. *Id.* at art. 2, para. 4.

11. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed. 1998). Not only the U.N. Charter but also, *inter alia*, the Montevideo Convention on the Rights and Duties of States (1933), the Charter of the Organization of American States (1948), the Helsinki Final Act (1975).

12. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 99–100 (June 27).

13. *See, e.g.*, United Nations Conference on International Organization, San Francisco, U.S., June 4, 1945, *Summary Report of Eleventh Meeting of Committee I/1*, 334–35.

14. Jonathan I. Charney et al., *Editorial Comments: NATO's Kosovo Intervention*, 93 AM. J. INT'L L. 824, 835 (1999).

15. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 82 (Cambridge University Press 2001) (1988).

16. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 24–26 (2nd ed. 2004).

17. ALBRECHT RANDELZHOFER, *Article 2(4), in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 106, 112–13 (Brunno Simma ed., 2002).

18. U.N. Charter, *supra* note 6, at chapters 7–8.

of any military action will, therefore, depend on the applicability of either of these exceptions, which are examined below.

B. Military Actions Authorized by the Security Council

The UN Charter does in fact envision the possibility of addressing an *emerging* threat with military force if necessary. Under Chapter VII, the Security Council may authorize military action not only in response to an act of aggression or a breach of the peace, but even against threats to the peace with a view to preserve international peace and security.[19] Should a State pose a threat to another, the Charter gives full authority to the Security Council as "the international community's collective security voice"[20] to provide a response beginning with non-violent sanctions leading up to use of military force, including preventive force, to preserve international peace and security.[21]

This position was re-stated recently by the UN High-level Panel on Threats, Challenges and Change and subsequently by the Secretary-General Kofi Annan in his report *In larger freedom*.[22] In its report of December 2004, the Panel concluded that the Security Council mandate under Chapter VII of the UN Charter is broad enough to include approval of coercive action even where the threat is not imminent and even if it involves non-State actors. [23] In fact, when all other preventive efforts have failed, collective military action is seen by the panel as a cornerstone of effective collective security system.[24]

Given the broad political discretion the Council enjoys in acting under Chapter VII, the question emerges of how its power should be exercised "when the Charter offers no specific criteria, when States see their interests so differently and when some States exercise so much more influence than others."[25] Taking these concerns into consideration, the High-level Panel proposed the following criteria to guide the Council's decision on recourse to armed force: seriousness of threat; proper purpose; last resort; proportional means; and balance of consequences.[26]

---

19. *Id.* at chapter 7.

20. The High-Level Panel, *Report of the High-level Panel on Threats, Challenges and Change*, ¶194, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *Report of the High-level Panel*].

21. U.N. Charter, *supra* note 6, at art. 39–42.

22. *See generally* The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005 (March 21, 2005) [hereinafter *In Larger Freedom*].

23. *Report of the High-level Panel*, *supra* note 20, at ¶ 193.

24. *Id.* at ¶¶ 190–91.

25. Gareth Evans, When is it Right to Fight? Legality, Legitimacy and the Use of Military Force, Lecture at Oxford University (May 10, 2004), *available at* http://www.crisisgroup.org/home/index.cfm?id=2747&l=1 (last visited Nov. 18, 2006).

26. *Report of the High-level Panel*, *supra* note 20, at ¶ 207.

Thus, as a safeguard against future violent actions between States, the Charter introduced a system of collective security to replace the previously almost unfettered recourse to unilateral military actions. Should a State pose a threat to another, the Charter gives full authority to the Security Council as "the international community's collective security voice"[27] to provide a response beginning with non-violent sanctions leading up to use of military force, including preventive force, to preserve international peace and security. After all, as Christopher Greenwood observed, "the Charter is about keeping the peace, not about pacifism."[28]

C. *Unilateral Actions: Self-Defence and Its Limits*

1. Self-Defence against Threats of Attacks under the UN Charter

Without a Security Council authorization, States may only use force in individual or collective self-defence to repel an armed attack.[29] The provision of Article 51 of the Charter provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.[30]

The language of Article 51 clearly stipulates that self-defence is lawful only where there is an armed attack, clearly a narrower notion than the use (or threat) of force prohibited by Article 2(4). Not every use of force necessarily amounts to an armed attack and consequently States are not entitled to defend themselves against every use of force.[31] The interpretation of the phrase "armed attack" is a matter of significant disagreement and the Charter itself offers no

---

27. *Id.* at ¶ 194.

28. Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 10 (2003).

29. The term "self-defence" is hereinafter used to denote both the individual and collective modes of self-defence.

30. UN Charter, *supra* note 6, at art. 51.

31. This is in perfect accord with the architecture of the Charter regulation of the use of force significantly limiting the unilateral force of States in favour of the multilateral response through collective security mechanisms.

guidance on this issue.[32] Nevertheless, it is widely accepted today that the notion of armed attack includes the *indirect* attacks in which a State does not use military force against another State directly, but through the use of *non-State actors* (such as insurgents), as well as acts by non-State actors, when they are equivalent, by its "scale and effects," to an armed attack by a State.[33]

Moreover, the Charter itself gives no clear answer as to whether unilateral military action against a *threat* of an armed attack may ever be justified. The language of Article 51 makes it clear that self-defence is lawful only when an armed attack *occurs* and not as a first strike option. However, the Charter does not define at which point in time an "armed attack" begins and nothing in this provision itself implies the legality or illegality of the use of force in cases when an armed attack is *about to occur*.

Since the Charter is silent about whether "self-defence" includes the anticipatory use of force, other general sources of international law must be used, including state practice and the works of learned writers on international law.[34]

2. Anticipatory Self-Defence in Customary International Law

Before the Second World War, international customary law traditionally endorsed the idea that a State can respond to an impending attack. The doctrine of anticipatory self-defence appears in the early writings of legal philosophers such as Grotius, Pufendorf, and Vattel, although with no common understanding of its scope.[35] For instance, Grotius wrote that the danger "must be immediate and imminent in point of time . . . but those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived and deceive others."[36] In turn, Vattel opined that a nation has "the right to prevent an injury where it sees itself threatened with one."[37]

---

32. Two main contemporary approaches exist to the reading of the doctrine of self-defence and the meaning of 'armed attack' in its temporal sense: that which is narrowly construed as to allow self-defence only in response to an *actual* armed attack and the doctrine of anticipatory self-defence justifying military action also against *imminent* armed attacks.

33. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 194–95 (June 27). State practice, at least in the aftermath of the 9/11, supports such interpretation of Article 51.

34. Following the conception formulated in Article 38 of the Statute of the International Court of Justice.

35. For a detailed comment on their writings see Abraham D. Sofaer, *On the Necessity of Preemption*, 14 EUR. J. INT'L L. 209, 216 (2003).

36. HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 173 (Francis W. Kelsey trans., 1925), *quoted in* Miriam Sapiro, *Iraq: The Shifting Sands of Pre-emptive Self-Defence*, 97 AM. J. INT'L L. 599 (2003).

37. EMMERICH DE VATTEL, THE LAW OF NATIONS 243 (Charles G. Fenwick trans., 1916).

Based on the *Webster formula,* articulated in 1837 in the context of the U.K.-U.S. *Caroline* dispute, military action in self-defence was deemed legitimate only if the "necessity of self-defence [was] instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . ."[38] In line with the general traditional criteria, self-defence in anticipation of an armed attack is justified only when it is necessary and proportional to the threat at hand, in other words, self-defence must not be retributive or punitive.

The applicability of this customary law doctrine after the entry into force of the UN Charter and its general ban on the unilateral force remains somewhat debatable. The UN Secretary-General Kofi Annan highlighted the disagreement between States on this issue: "They have disagreed about whether [s]tates have the right to use military force pre-emptively, to defend themselves against imminent threats; whether they have the right to use it preventively to defend themselves against latent or non-imminent threats . . . ."[39] In practice, states have mostly refrained from invoking the doctrine of anticipatory self-defence to justify their military actions after 1945 even when the facts of the case would allow it.

The 1962 Cuban Missile Crisis is often mentioned as an example of anticipatory self-defence. However, the Soviet-Cuban maritime quarantine imposed unilaterally by the United States to intercept the missiles, travelling on the high seas to be installed by the Soviets in Cuba, was never justified by the United States in this way. Instead, the U.S. administration claimed to have taken a regional enforcement action previously authorized by the Organization of American States.[40]

In one particularly relevant example, Israel argued that its attack against Egypt beginning the Six Days War in 1967 was a lawful exercise of self-defence. The incident, which prima facie appeared to be a case of anticipatory self-defence, was not explicitly condemned by the Security Council despite the proposal put forward by the Soviet Union.[41] However, a closer look at the Israeli claims in the course of events reveals that Israel based its justification

---

38. Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841), *reprinted in* BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE CONFIDENTIAL PRINT, part I, series C, vol. 1 153, 159 (Kenneth Bourne ed., 1986).

39. *In Larger Freedom, supra* note 22, at ¶ 122.

40. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 218, 228 (2nd ed. 1979). In this context, it is worth noting that to consider state practice alone as constitutive of customary law would be to deny the normative nature of international law. It is the second requirement, the expression of a feeling of legal obligation *(opinio juris)*, that demarks the transposition of state practice onto customary law. In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice stated that the substance of customary international law must be found primarily in the actual practice and feeling of obligation of States, 1996 I.C.J. 226, 253 [hereinafter *Nuclear Weapons Opinion*].

41. *See* Greenwood, *supra* note 28, at 14.

on a broad construction of an armed attack, rather than on the doctrine of anticipatory self-defence—it maintained that its action was an act of self-defence under Article 51 of the Charter after Egyptian forces had attacked Israel first.[42]

In one contrasting example, Israel did try to justify its 1981 attack on the Osirak nuclear reactor under construction in Iraq on the basis of anticipatory self-defence. The Israeli government attempted to describe their action as a response to Iraqi threats to develop nuclear weapons to be used against Israel in the near future.[43] But the international response was sharply critical: the Security Council roundly rejected Israeli arguments in its resolution 487.[44] Most members of the Security Council expressed their disagreement with the Israeli view, by unreservedly voting in favour of the operative paragraph one of the resolution, whereby the Council strongly condemned "the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct."[45] For instance, Egypt and Mexico explicitly rejected the doctrine of anticipatory self-defence. The United Kingdom likewise condemned the Israeli attack "without equivocation." The then Prime Minister, Margaret Thatcher, was characteristically blunt: "Armed attack in such circumstances cannot be justified. It represents a grave breach of international law."[46]

These are not all instances of state practice where preventive or anticipatory self-defence was a relevant issue, but they do reveal that state practice is too scarce and inconsistent to allow any *clear* conclusion about the legality and scope of anticipatory self-defence after 1945. But it needs to be pointed out that at least on the policy level (*opinio juris*) some of the key actors, such as the United States, United Kingdom, France, Russia, and Australia, have explicitly accepted its validity in certain pressing circumstances.

A prevailing view in legal scholarship seems to likewise accept that anticipatory self-defence is permitted in the post-Charter international law, but has traditionally required the existence of an imminent threat.[47] A significant

---

42. *Summary Records of the 19th Meeting*, [1967] Y.B. of U.N. 196, U.N. Sales No. E.68.I.1.

43. *See, e.g.*, Sean D. Magenis, *Natural Law as the Customary International Law of Self-Defence*, 20 B.U. INT'L L.J. 413, 427(2002).

44. S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (June 19, 1981).

45. *Id.*

46. Michael Byers, *A New Type of War*, 26 LONDON REVIEW OF BOOKS (online edition) (2004), *available at* http://www.lrb.co.uk/v26/n09/byer01_.html (last visited Sept. 15, 2006) (*quoting* Prime Minister Margaret Thatcher).

47. Many prominent commentators including Dinstein, Greenwood, and Schachter have asserted that the *Caroline* criteria survived the entry into force of the UN Charter. In their view, they remain at the very least a valuable tool for interpretation of the right of self-defence, helpful also in determining whether and when that right may be invoked to deal with the modern threats.

number of eminent scholars, including Bowett,[48] Franck,[49] Greenwood,[50] Higgins,[51] and Sands,[52] have argued that a threat may be so direct and overwhelming to allow for self-defence also in case of an impending attack under certain strict conditions. Recently, the UN High-level Panel, while acknowledging the restrictive language of Article 51, held in its report that "a threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate."[53] However, when the attack is not imminent, authorization from the Security Council for the use of military force should be secured.[54]

3. The Limits of Anticipatory Self-Defence: The Caroline Criteria

Jennings and Watts argued that anticipatory action in self-defence can be justified under international law when an attack is imminent, creating an urgent necessity for defensive action, leaving no practicable alternative, in particular, when another State or other authority which has the legal powers to stop or prevent the infringement is not able or willing to do so.[55] Due to the obvious risk of abuse of a more permissive conception of self-defence, the general requirements of necessity and proportionality would have to be applied *a fortiori* to any invocation of anticipatory self-defence.[56]

Necessity demands, essentially, that all non-military alternatives of redress have been exhausted and the use of force remains the only viable option to prevent the attack in the particular circumstances.[57] Cassese has emphasized that there must be "solid and consistent evidence" that another State is about to engage in "a large-scale armed attack jeopardizing the very life" of a target

48. DEREK W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 187–192 (1958).

49. *See generally* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002).

50. *See* Greenwood, *supra* note 28.

51. Rosalyn Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force, in* THE CURRENT LEGAL REGULATIONS OF THE USE OF FORCE 435, 442 (Antonio Cassese ed., 1986).

52. Philippe Sands, International Law and the Use of Force, United Kingdom Parliament, ¶ 15 (July 30, 2005), *available at* http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4060805.htm (last visited Nov. 18, 2006).

53. *Report of the High-level* Panel, *supra* note 20, at ¶ 188.

54. *See, e.g., In Larger Freedom, supra* note 22, at ¶¶ 124–25.

55. *See generally* PEACE, OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 1991).

56. *Id.* at 41–42.

57. *See, e.g.*, Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 530, 535–36 (2003).

State having no peaceful means of resolving the dispute at hand due to the imminence of the attack and the futility of the measures.[58]

It is not always entirely clear what the condition of proportionality requires. Dinstein proposed that this quintessential principle of self-defence, in its basic terms, be understood as "a standard of reasonableness in the response to force by counter-force."[59] There must be a symmetry or at least an approximation between the action and it defensive purpose, namely that of preventing the attack from occurring.[60] Already in 1963, McDougal and Feliciano argued that the principle of proportionality must be applied with some flexibility, according to the specifics of a particular context.[61] The scope of the defensive action may under certain circumstances need to exceed the scale and scope of the first attack or the threatened attack.[62]

As the third general limit on self-defence, the immediacy condition means that there must be no "undue time-lag between the armed attack and the exercise of self-defence."[63] This requirement has already been more broadly construed in state practice in the age of terrorism and attacks without warning. It has been interpreted as enabling a reasonably delayed response "where there is a need to gather evidence of the attacker's identity and/or collect the intelligence and [organize the] military force in order to strike back in a targeted manner."[64]

Undoubtedly, the concept of imminence is the most problematic variable of anticipatory self-defence and one that has no precise definition in international law. It is currently rather unclear when an attack is sufficiently "imminent" to justify military action in self-defence and it may indeed be very difficult to ever express the imminence of a particular threat "in a legally robust fashion."[65]

The *Caroline* requirement seems to have centred on the temporal dimension of the notion and it is very stringent. It considers the threat to be imminent when the attack is just about to occur or, in other words, when "[a]n

---

58. Higgins, *supra* note 51, at 233.

59. Dinstein, *supra* note 15, at 184.

60. *See also* Leo Van Den Hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 69, 103 (2003).

61. MYERS S. MCDOUGAL AND FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 217 (1961).

62. *Id.*

63. Dinstein, *supra* note 15, at 184.

64. ANGUS MARTYN, THE RIGHT OF SELF DEFENCE UNDER INTERNATIONAL LAW: THE RESPONSE TO THE TERRORIST ATTACKS OF 11 SEPTEMBER, LAW AND BILLS DIGEST GROUP, DEPARTMENT OF THE PARLIAMENTARY LIBRARY 10 (2002).

65. New Warfare and the Allies, Select Committee on Defence Sixth Report, United Kingdom Parliament, ¶ 139 (May 2003), *available at* http://www/publications.parliament.uk/pa/cm200203/cmselect/cmdfence/93/9311.htm (last visited Nov. 18, 2006).

attack is in evidence."[66] Unilateral defensive force could accordingly be used only in situations where weapons have been visibly launched but have not yet reached their targets, or when forces have at least been mobilized with apparently aggressive intent.[67]

Such a restrictive requirement could hardly ever be satisfied in the context of asymmetric warfare launched by terrorists or hostile governments. Applying the narrow standard of temporal imminence in an age in which technology allows great devastation to be wrought in a very short period of time would disable a State from effectively repelling the attack and protecting its population from potentially great harm. The purpose of the following section is to evaluate the need and potentials for adapting the traditional doctrines to the changing realities.

III. REGULATION OF FORCE IN THE TWENTY-FIRST CENTURY: A TIME FOR CHANGE?

A. Redefining Imminence: Need for Clear(er) Standards

If the ultimate goal of international law is to preserve State's right to effective self-defence, the standard of imminence may need to be read more broadly. In that sense, the U.S. administration does not seek to overturn the rule but seeks to explore how the rule and its underlying purpose could be applied in particular situations that did not exist in the past.

Christopher Greenwood exposed two new factors not incorporated in the *Caroline* test which should be relevant in determining whether an attack is imminent: the gravity of the threat and the method of delivery of the threat.[68] The potentially cataclysmic dimensions of an attack with nuclear, biological, or chemical weapons make this threat so disproportionate to the conventional threats that existed in the times of the *Caroline* case that it would be suicidal to wait until the attack is visibly underway.[69] At the same time, the development of advanced missile technology has improved the capability for stealth, leaving literally no time for defence once an attack is launched and before it hits its targets.[70] This is especially true with respect to contemporary terrorism

66. ELLEN O'CONNELL, THE MYTH OF PREEMPTIVE SELF-DEFENSE, AM. SOC'Y OF INT'L LAW TASK FORCE ON TERRORISM 9 (August 2002), *available at* http://www.asil.org/taskforce/oconnell.pdf (last visited Nov. 18, 2006).

67. *See* Allen Buchanan and Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 ETHICS & INT'L AFF. 1 (2004).

68. *See* Greenwood, *supra* note 28, at 16.

69. *Id.*

70. *Id.*

characterized by clandestine preparations and surprise attacks: the evidence of a specific attack coming will usually be only the attack itself.[71]

Therefore, the particularly grave threats which could materialize in attack without a reasonable degree of warning and time for defence may be regarded *imminent* even when the attack is not menacingly near. To quote Phillipe Sands, the concept of imminence must be flexibly interpreted "in an age in which technology allows great devastation to be wrought in a very short period of time."[72] Applying the narrow temporal standard of imminence in such contemporary reality might deprive a State from an opportunity to effectively repel the attack and protect its population from unimaginable harm. It would go counter to the object and purpose of the right of self-defence which provides States with a self-help mechanism to protect them from an attack when peaceful alternatives would prove inadequate and the multilateral response too tardy.

Clearly, international law does not and should not give States a *carte blanche* for aggression under the flag of anticipatory self-defence. Strict and objective criteria should be agreed upon before any such reinterpretation could be made. Some possibilities will now be examined.

If an attack is not temporally imminent, self-defence may be triggered only when the threat of attack can be clearly identified on the basis of credible intelligence. The threat must be very serious and its realization in case of inaction certain or highly probable. Otherwise, the relaxed standard would enable speculative defensive attacks clearly contrary to the restricting purpose of the international regulation of force. The existence of such threat has to be determined by reference to the capabilities of the alleged aggressor and their specific intent to attack. Indeed, the capabilities of today's adversaries are easier to conceal and the intent much more difficult to gauge. Nonetheless, mere unfocused malevolence cannot be sufficient to justify unilateral recourse to force.[73]

Once the threat has been appropriately identified, the defending State must be reasonably convinced that no other viable alternative for counter-action but military force remains. Clearly, the threshold for reaching such a conclusion will be much higher when the condition of temporal imminence is less strictly applied. Furthermore, in line with the traditional requirements for lawful self-defence, the nature of the actual response must be reasonably proportional and necessary to repel the threatened attack.

---

71. *Id.*

72. Sands, *supra* note 52, at ¶ 15.

73. *See generally* Rabinder Singh and Alison Macdonald, Legality of Use of Force Against Iraq, Matrix Chambers, London (Sept. 10, 2002), *available at* http://www.lcnp.org/global/IraqOpinion10.9.02.pdf (last visited Nov. 18, 2006).

Sofaer summarized these requirements by proposing a set of factors and circumstances that need to be considered when deciding whether the use of force in anticipatory force is really necessary:

1) The nature and magnitude of the threat involved;
2) The likelihood that the threat will be realized unless pre-emptive action is taken;
3) The availability and exhaustion of alternatives to using force; and
4) Whether using pre-emptive force is consistent with the terms and purposes of the UN Charter and other applicable international agreements.[74]

Clearly, this new attitude is not problem-free. As shown above, the concept of imminence is not free from ambiguities even when applied in its traditional temporal sense, where it was required for the attack to be evident, (at least possibly) visible to the potential victim and wider audience. More uncertainties will inevitably arise once the temporal threshold is lowered to accommodate contemporary security claims. The possible repercussions of this shift could be counter-productive, which is why the credibility of evidence will be one of the crucial conditions to satisfy in any given case. Admittedly, firm intelligence that a devastating blow may be coming will be much more difficult to attain than in the case where an attack is already underway; yet any error in threat assessment could create or exacerbate the conflict rather than forestall its violent manifestations.

In any case, an expansion of the circumstances validating self-defence will have to place a higher burden of proof on a State to justify the steps it took to avert an absolutely imminent attack. Unfortunately, this does not entirely prevent the risks of error and abuse since the current international legal order inherently lacks an effective system of accountability. That is why a serious attempt to develop more effective procedures and mechanisms of accountability must accompany any attempts to reinterpret the rules governing the unilateral use of force.

Without a common understanding of what constitutes an "imminent" threat in the context of contemporary security reality, broad agreement on a lawful military response will be hard to achieve. The standard of imminence should remain an important part of the analysis, although new dimensions, such as the gravity of the threat and the methods of delivery, need to be included into the concept alongside the traditional considerations of temporal imminence.

74. Soafer, *supra* note 35, at 220.

Certain standards must hence be agreed to guide the decision-makers through their considerations of unilateral military options in any given situation. Building on the various approaches as outlined above, a framework governing defensive actions against the non-conventional threats, could be developed along the following elements:

1) The specific character of the threat, including: the magnitude of potential harm; the nature of strategies, tactics, and methods of warfare (clandestine operations, surprise attacks, sophisticated technology, non-conventional weapons);
2) The capacities of the alleged adversary;
3) The manifestation of specific hostile intent of the alleged adversary;
4) The proximity of the threat and time available for defence;
5) The likelihood of the threat being realized;
6) Credible intelligence: availability of clear and convincing evidence;
7) The exhaustion of all viable non-military alternatives to reduce or eliminate the threat;
8) Compatibility of the military action with other principles of the UN Charter and customary international law (necessity and proportionality, duty to report to the Security Council, termination of unilateral action after the Council has undertaken the necessary steps).

B. Self-Defence beyond Imminence: Normative Perils of Preventive Actions

It seems possible to reconceptualize the Webster-formulated notion of anticipatory self-defence this way in order to respond to the technological and strategic developments that have made attacks stealthier, quicker, and more devastating. If all of the narrowly defined conditions are satisfied, such grave threats may justify an earlier use of unilateral defensive force that would be unacceptable in case of a less serious threat. A State need not wait until an attack is just about to occur, when waiting for that moment may deprive it of an opportunity to effectively defend itself and its people against a serious threat with potentially catastrophic consequences.

But the second dimension of the U.S. National Security Strategy statement on self-defence goes beyond the above stated or, in fact, any legal limits. The Bush administration made their case for military strikes against the non-

conventional threats even where "uncertainty remains as to the time and place of the enemy's attack."[75]

The main difficulty of such a stance is that when no credible reason exists to believe that a threat is temporally imminent or highly probable, the recourse to force against some unspecified hypothetical threats that might occur at some time in the future would not be anticipatory but preventive. Unlike anticipatory action, preventive war is not about pre-empting an immediate and credible security threat, but about foiling the unspecified threats that might have occurred at some uncertain time in the future. It is an offensive strategic response to a long-term threat, not a defensive tactical response to an impending attack, which is the underlying rationale of the anticipatory action.[76]

These pronouncements assert that the rules on self-defense need to be modified so as to allow States to prevent a future attack, even when there is no concrete evidence that an attack has been planned. On its face the proposed doctrine is radically different from the existing regulation of the use of force.[77] Contrary to the above discussion on adapting the existing legal standard of imminence to make it more responsive to the present-day circumstances, this second proposal is not a matter of degree, but a step into a different kind of legal order. In my opinion, the logic of unilateral preventive strikes against the threats-to-be, should also in the future be rejected in the global order governed by the rule of law due to many concerns of both legal policy and principle, some of which are contemplated below.[78]

1. Risks of Abuse and Instability of the Global Order

The essential problem of the U.S.-proposed doctrine is that it lacks any conceptual clarity as to the actual scope and objective criteria for its implementation. Such an excessively vague and politically attentive reading of self-defence would enable the powerful actors to freely determine when and how the rule applies and would increase the danger of abuse in pursuit of some narrow national interest. Miriam Sapiro has described the willingness to unilaterally use force against emerging threats before they are fully formed as

---

75. National Security Strategy, *supra* note 3, at 15.

76. The distinction is partly borrowed from Jack S. Levy, *Declining power and the Preventive Motive for War*, 40 WORLD POL. 82, 91 (1987).

77. States themselves are reluctant to endorse these developments. Apart from US, Russia, Israel and Australia, most other key actors have expressed both political and normative resentment to the idea of preventive strikes.

78. The conclusion of the UN High-level Panel was similarly straight-forward: "[I]n a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted." *Report of the High-level Pane*, *supra* note 20, at ¶ 191.

taking "the already controversial doctrine of anticipatory self-defence a step further into the realm of subjectivity and potential danger."[79]

Indeed, power politics will always play an important role in international system and the legal constraints on that power will probably never be completely free from uncertainties. But opening the way to military actions subject only to the more or less reliable threat assessment by single States and incapable of formal legal scrutiny, could lead to an unrestricted exercise of power against some perceived threats. Sofaer has zealously underlined this risk: "[a]ny such doctrine would purport to allow States to attempt to ensure their individual security, but by creating massive insecurity for others and ultimately for themselves."[80]

The conclusion of the UN High-level Panel was similarly straight-forward:

> [I]n a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted.[81]

2. The Boomerang Effect: Return to Violence

Universal acceptance of the preventive strikes doctrine would create greater potential for violence, the effect of which on reducing the contemporary risks is highly questionable or even counter-productive. For example, highlighting the preventive option would likely encourage the allegedly hostile governments to accelerate development of precarious "launch-on-warning" weapons systems and increase their military preparedness. The conflict with North Korea and the recent escalation of the Iranian nuclear question expose exactly these concerns. On the other hand, others may arm offensively to "prevent the preventor" from eventually transferring them to the list of targets.[82]

Accepting this doctrine as a part of international law would in principle enable that these two states to assert the right to attack the United States in order to *prevent the preventor* from striking first. Subsequently, this could fatally erode the already fragile norms and institutions designed to prevent proliferation of weapons of mass destruction.

There is indeed no a priori satisfactory answer to these difficult questions of risk management. But in a world that has become increasingly aware of the advantages of using cooperative or "soft" power, tackling problems through

---

79. Sapiro, *supra* note 36, at 599.

80. Abraham D. Sofaer, Statement to the National Commission on Terrorist Attacks Upon the United States (March 31, 2003).

81. *Report of the High-level Panel*, *supra* note 20, at ¶ 191.

82. Although this is only speculation, Saudi Arabia and Pakistan could qualify as examples.

persuasion rather than coercion, through economic and social influence rather than military coercion, a shift in favour of the "hard power" would be a step in reverse. This trend would undermine the rule of law in international relations, promote the solving of problems through force rather than law, and deride the efforts of preventive diplomacy and other peaceful preventive tools. As Arthur Schlessinger Jr. eloquently observed, the new US strategy leads to replacement of "a policy that aimed at peace through the prevention of war by a policy aimed at peace through preventive war."[83]

3. Endangering Sovereign Equality of States

In addition to the general implications already discussed, the doctrine of preventive self-defence as uttered by the U.S. administration, threatens one of the fundamental principles of international law, the principle of sovereign equality of States. Obviously, the United States does not want to make prevention a widely accepted doctrine; the idea was, so it seems, to develop a new concept that would, however, not be universally applicable. What would they say in the entirely hypothetical event that China wanted to take preventive action against Taiwan, saying that Taiwan was a threat to it? Or what if India decided to attack Pakistan on that ground, or vice versa?

The U.S. administration is well aware that a formal legal reformulation tailored exclusively to further US security interests would never gain the widespread acceptance necessary to change the Charter or even customary international law. But as Michael Byers observed, a de facto exceptionalism might be accomplished indirectly, for instance "by introducing increased ambiguity and thus providing more scope for power and influence in the application of the rules to specific circumstances."[84]

However, granting one or few great powers a privileged authority (either formally or informally) over assessment and thwarting of aggressive threats can hardly be reconciled with the principles of the international order, especially in the area as sensitive as the international peace and security.

4. Weakening of International Norms and Institutions

There are additional problems with the argument that radical times require radical means, reaching beyond the risk of the open-ended and ultimately anarchic resorts to force. They entail also broader doctrinal difficulties. Introducing into international law a rule incapable of defining workable legal

83. Arthur Schlessinger Jr., *Eyeless in Iraq*, 50 N.Y. REV. BOOKS 24 (Oct. 23, 2003).

84. Michael Byers, *Pre-emptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 171, 184 (2003).

limits on the defensive use of force, would mean, as Bothe pointed out, "that the validity of the prohibition of the use of force itself will be in jeopardy."[85]

There must remain at least some objective, non-political, standard by which the military actions of States can be evaluated and either supported or condemned as illegitimate. Eliminating even the minimum legal standards (albeit partly unclear and controversial) and replacing them with purely subjective judgments would mean to deprive international law on the use of force of its normative character. In words of Thomas Franck: "a general relaxation of Article 51s prohibitions on unilateral war-making to permit unilateral recourse to force whenever a State feels potentially threatened could lead to a *reductio ad absurdum*" and would "negate any role for law."[86]

IV. CONCLUSION

It is safe to say that the basic underlying assumptions of the doctrine of self-defence no longer accurately reflect the geo-strategic realities characterized by unconventional, asymmetric warfare, launched by trans-national terrorist groups or other ostensibly undeterrable international actors. Law should of course be sensitive to the new realities if it is to retain its normative power, but cautiousness is needed as to the degree of modification. Its potential adaptation seems to be more a matter of a careful re-interpretation of the existing rules rather then dropping them altogether.

The challenges attending a more permissive approach to the unilateral use of force require that any agenda relaxing the legal constraints on the unilateral resort to force should be based on at least three main objectives. First, prevention of the global security risks should remain a matter of collective response. The Security Council is fully empowered to deal with every kind of threat that States may confront, even with military force.[87] This mechanism of collective action has been created exactly with the purpose to replace the lack of an objectively definable threshold of probability with regard to unspecified and hypothetical future threats. Therefore, eventual *preventive* military action should be taken only with the prior Security Council authorization.

Second, in the context of modern warfare and shifts in strategic threats, States may well need to use force without a prior Security Council authorization, even when an armed attack is not temporally imminent, but the threat of it is overwhelming. However, clear and objectively verifiable criteria for

85. Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 237 (2003).

86. Franck, *supra* note 49, at 98.

87. Recently, the Council has also quite properly shown increasing willingness to characterize more general security concerns including terrorism and the proliferation of weapons of mass destruction as threats to international peace and security.

evaluation of the threat must first be developed to improve the unilateral decision-making and to reduce the risk of error. An anticipatory action outside the Security Council framework should be acceptable only after compelling evidence is provided that there is a clear and present danger and that there are no practical alternatives to a military strike

Finally, effective procedures and mechanisms of international review must be established to screen every unilateral use of force and to ensure accountability in cases of abuse. Admittedly, this goal will be most difficult to achieve. But until more effective procedures and mechanisms of accountability are established, those powerful and creative governments that are prepared to use force in bad faith will be able to overstretch any limits on the use of force to provide a rationale for nearly any aggressive action not authorized by the Security Council.

In conclusion, let me point out once more that taken as a whole, the collective security system combined with a carefully re-interpreted doctrine of self-defence would enable States to respond fully reactively, anticipatorily, or preventively, to the necessities of the modern security environment. It is both needless, as a matter of law, and too perilous for the stability of international order, to eradicate the normative restraints on the unilateral preventive military action. Such reality would only foster paranoiac aggression, not peace.